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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2005-06
(session year)

Senate
(Assembly, Senate or Joint)

Committee on Judiciary, Corrections and Privacy...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
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INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
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- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (July 2012)

Senate

Record of Committee Proceedings

Committee on Judiciary, Corrections and Privacy

Senate Bill 315

Relating to: retention and testing of evidence that includes biological material, time limits for prosecuting a crime that is related to a sexual assault, law enforcement procedures for using an eyewitness to identify a person suspected of committing a crime, making audio or audio and visual recordings of custodial interrogations, limitations on admitting unrecorded statements into evidence in juvenile delinquency and criminal proceedings, and creating a grant program for digital recording equipment and training for digital recording of custodial interrogations.

By Senators Zien, Coggs, Miller, Harsdorf, Risser, Darling, Hansen, Roessler, Kapanke, S. Fitzgerald and Lazich; cosponsored by Representatives Gundrum, Bies, Staskunas, Colon, Ziegelbauer, Krawczyk, Van Roy, Sheridan, McCormick, Van Akkeren, F. Lasee, Nelson, Hundertmark, Turner, Nischke, Fields, Musser, Molepske, Pettis, Gronemus, Ott, Cullen, Lothian, Kestell, Stone, Albers, Hahn, LeMahieu, Hines, Jensen, M. Williams, Townsend and Kleefisch.

September 02, 2005 Referred to Committee on Judiciary, Corrections and Privacy.

September 7, 2005 **PUBLIC HEARING HELD**

Present:	(5)	Senators Zien, Roessler, Grothman, Taylor and Risser.
Absent:	(0)	None.

Appearances For

- Mark Gundrum, Madison — Representative
- Penny Beernsten, Naperville
- Keith Findley, Madison — State Bar Criminal Law Section
- Judy Schwaemle, Madison — Avery Task Force
- Scott Horne, LaCrosse — WDAA
- Ed Kondracki, Madison — Wisconsin Chief of Police
- Davin Miller, River Falls
- John Birdsall, Milwaukee — Wisconsin Association of Criminal Defense Lawyers
- Rolf Lindgren, Middleton — Libertarian Party of Wisconsin
- Steve Avery
- Pedro Colon, Milwaukee — Representative
- Gerald Mowris, Madison — State Bar of Wisconsin Criminal Law Section

Appearances Against

- None.

Appearances for Information Only
- Anna Puzinski, Milwaukee — Milwaukee Police Department
- Joe Leibham, Madison — Senator
- Peg Lautenschlager, Madison — Attorney General, Department of Justice

Registrations For
- Dave Zien, Madison — Senator
- Gary Bies — Representative

Registrations Against
- None.

September 13, 2005 **EXECUTIVE SESSION HELD**

Present: (4) Senators Zien, Roessler, Grothman and Risser.
Absent: (1) Senator Taylor.

Moved by Senator Roessler, seconded by Senator Zien that **Senate Amendment 0971** be recommended for adoption.

Ayes: (5) Senators Zien, Roessler, Grothman, Taylor and Risser.
Noes: (0) None.

ADOPTION OF SENATE AMENDMENT 0971 RECOMMENDED, Ayes 5, Noes 0

Moved by Senator Roessler, seconded by Senator Zien that **Senate Bill 315** be recommended for passage as amended.

Ayes: (5) Senators Zien, Roessler, Grothman, Taylor and Risser.
Noes: (0) None.

PASSAGE AS AMENDED RECOMMENDED, Ayes 5, Noes 0

Brian Deschane
Committee Clerk


FORWARD
E PLURIBUS UNUM

Judiciary Committee Hearings: September 7, 2005

Representative Gundrum, members of the Assembly and Senate Judiciary Committee, Attorney General Peg Lautenschlager, Steve and Mr. and Mrs. Avery: thank you for the opportunity to address you this morning regarding the proposed legislation before you today.

My name is Penny Beerntsen and I am the woman who, twenty years ago, mistakenly identified Mr. Steve Avery as the individual who attempted to sexually assault and murder me. I have known for two years that he is innocent of those crimes. He and his family and friends have known that all along. Not a day goes by that I don't think about Mr. Avery, his family and the suffering they endured and continue to endure. My heart aches equally for the Green Bay woman who was brutally attacked in 1995 by Gregory Allen, my actual assailant.

Unfortunately, we cannot turn back the clock to right these wrongs. We can only look ahead and try to make changes in a number of areas to lessen the likelihood of wrongful convictions in the future. That challenge and opportunity is what brings us here today.

Representative Mark Gundrum has asked me to share details of the identification process following Gregory Allen's sexual assault and attempted murder of me, since a portion of the proposed legislation deals with eyewitness ID procedures. In order for you to understand the conditions under which I made my initial identification, you need to know some of the details of the attack. I will keep this description as sanitized as possible and apologize in advance if this is difficult to hear. I ask the indulgence of those members of the Avery Task Force who are present today, as part of this testimony is similar to the statement I read to the Task Force in February of 2004.

On July 29, 1985 I was attacked while jogging on the shoreline of Lake Michigan, north of Neshotah Beach in Two Rivers, Wisconsin. A minute or two before Gregory Allen came out of the dunes and grabbed me, I looked at my watch. Therefore I had an accurate fix on the time the assault began. When he grabbed me I screamed for help. He then tightened his chokehold on me, closing off my windpipe so I could no longer yell. Mr. Allen then said,

"We're going to take a little walk into the sand." He pushed me up into the sand dunes where I was no longer visible to anyone who might be on the beach. When I attempted to break loose from him, he told me "Do what I tell you. I've got a knife."

Gregory Allen pushed me into a wooded area where he ordered me to do sexual acts for him. When I refused to cooperate, he became angry, pushed me over and pinned me down on the ground. He began to viciously beat me with his fists, primarily around my head and face. He broke my nose. I continued to struggle. At one point, I brought up my leg and kicked him in the groin. He became enraged. He told me "Now you're going to die. Now I am going to kill you." He then began violently shaking my head and shoulders up and down. He repeatedly banged the back of my head against either a rock or a tree root. He choked me hard enough that I believed I was about to lose consciousness.

He alternately beat and strangled me. I believe I lost consciousness, although I am not sure that becoming unconscious is something one remembers. When the state later reconstructed the time line of events, they found that there is an hour of time for which I cannot account. When I was finally able to get myself to a seated position, I was alone. I looked at my watch and thought it was gone. My vision was so badly blurred that I could not see it.

I managed to crawl back to the shoreline, fading in and out of consciousness along the way. When I reached the water's edge, two nearby Good Samaritans assisted me back to Neshotah Beach where my husband and authorities were searching for me.

In the emergency room, a female deputy from the Manitowoc Sheriff's Department questioned me about the assault and the physical description of my assailant. She took statements from me intermittently over a three to four hour period of time. In between being questioned by the deputy, a physician and two nurses performed the highly intrusive rape protocol procedures; others took me for x-rays, drew blood from me and stitched my facial cuts. At some point while I was still in the ER the Sheriff arrived and asked some additional questions. Eventually I was given a statement that the female deputy had written out. She asked me to read it and initial the bottom of each page. I tried to read the statement but since my vision was still blurred, I was unable to read it. I initialed each page anyway.

The hospital staff then took me to a hospital room where I described my assailant to another sheriff's deputy so he could hand draw a composite picture of him. For at least part of that time, the Sheriff was present in the room. During the drawing of the composite, my vision had cleared sufficiently that I could now see my watch.

Following the making of the composite drawing and before I was shown the photo array, I asked the Sheriff and the deputy if they had a suspect in mind. I believe it was the Sheriff who told me "yes".

The Sheriff then put nine photos on my hospital bedside table in three rows of three. The Sheriff instructed me to look at them and attempt to determine whether I saw my attacker's picture among them. Based on the fact that he told me he had a suspect in mind, I believed that the suspect's photograph was included in the group of nine photos. I now know that Gregory Allen's photo was not in that array. I did select Mr. Avery's photograph. I understand that personnel from the Sheriff's Department arrested Mr. Avery around midnight, approximately eight hours after Gregory Allen attacked me and approximately two hours after I selected Steven Avery's photograph. The next morning I was told---I believe by my husband---that the person whose photo I selected had been arrested.

At around midnight of the first or second night after I returned home from the hospital, I received an obscene telephone call. The caller knew some of the details of the crime, although nothing he couldn't have learned from media reports. The following morning, I reported this call to the Sheriff. Thankfully, he sent the female deputy who had questioned me in the hospital to our home, to stay with me as a safety precaution.

The next day, the Sheriff put together a live line-up. He told me that he wanted to "make sure that we have the right person in custody." After looking at all eight men in the lineup, I picked out Steven Avery as my assailant. I now know that Gregory Allen was not in that live lineup and that Mr. Avery was the only man who was in both the photo array and the live lineup.

My point in spending so much time on the in-person lineup is that it is possible that if I had not received that obscene phone call, there may never have been a live lineup. I do want you to know that almost all of the

information that the state did share with me during the ongoing prosecution pointed to Mr. Avery's guilt. Although I was told that he had alibi witnesses, I also knew that despite his statement that he had been pouring concrete the day I was assaulted, the crime laboratory found no concrete dust on his clothing.

Following Steven Avery's conviction, I continued to receive occasional harassing telephone calls. I usually received those calls about five minutes after I returned home from work and was alone in the house. At the time, I said to my husband,"It's almost like someone is watching me." We now know that making intimidating telephone calls and window peeping was part of Gregory Allen's M.O.

Within a couple of weeks of my assault, I received a telephone call from someone at the Manitowoc Police Department. He asked me if I was sure about my identification of Mr. Avery and told me that the police had another suspect in mind who matched the description I had given of my assailant. He indicated that they wanted to talk to me about this other individual. He asked whether I had noticed anyone parking his car outside our home, or following me when I jogged or watching me teach fitness classes at my place of employment. I told him that I had not noticed any of these things.

I became alarmed in learning that there could be a suspect other than Mr. Avery. I was very afraid for my personal safety as well as for the safety of my husband and two young children. I immediately called the Sheriff's Department and relayed the contents of the call from the Manitowoc Police Department. I asked something to the effect of "What's this about another suspect?" The Sheriff's Department told me that the Police Department did not have jurisdiction in this case. They assured me that they would check on this suspect. When I later made a follow-up call to the Sheriff's Department, I was told that other suspects had been looked at and were ruled out as my assailant.

Following Mr. Avery's exoneration, Attorney General Peg Lautenschlager and her staff conducted an investigation of the case, in an attempt to discover what went wrong. It was not until I read the Attorney General's report that I even learned of Mr. Allen's existence and his past behavior as a sex offender. When I read the report I discovered that the Manitowoc Police Department had placed daily surveillance on Mr. Allen because of that Department's belief that he would commit more sexual offenses. I also

learned that the very day that the police were unable to watch Mr. Allen was the day that he attacked me.

Despite all that went wrong in this case, I cannot emphasize strongly enough the importance for crime victims to continue to report the crime to law enforcement. No system of justice is fail-safe. No victim or witness should be so paralyzed by a fear of misidentification that he or she decides not to report the crime at all. Eyewitness identification plays an important role in our criminal justice system. Fortunately, research scientists have shown there are methods of obtaining eyewitness identifications that can cut the rate of mistaken identification by approximately 50%.

The legislation being considered today, LRB-3492 and LRB-3495, is the result of two years of intense work by members of the Steven Avery Task Force. It is especially noteworthy that this task force was bipartisan in nature and, in addition to legislators, included judges, law enforcement officials, prosecutors, defense attorneys and victim advocates. That a group this diverse reached consensus on the proposed legislation is testimony to the motives of the task force members: namely, to improve Wisconsin's criminal justice system. The portion of the legislation that deals with eyewitness identification procedures requires that every law enforcement agency have a written policy regarding their eyewitness identification procedures. While the legislation does not specify what that policy must be, the Task Force in January put together a document of recommended practices to assist law enforcement agencies in putting together their policies.

In addition, Attorney General Lautenschlager and her staff, with collaboration from Professors Keith Findley and Byron Lichstein from the University of Wisconsin Law School, developed instructional materials which will help restore confidence in the criminal justice system. Their "Eyewitness Identification Best Practices Manual" is completed. Ken Hammond from the DOJ Training and Standards Bureau has used this manual in a series of seminars around the state. He and other professionals have trained over 500 law enforcement investigators in the techniques that research scientist have shown will reduce the risk of wrongful convictions while increasing the probability of convicting the guilty. The AG's office has also changed both the police recruit curriculum and the Wisconsin Law Enforcement Criminal Law Handbook to include eyewitness ID best practices.

Among the best practices recommended by both the Avery Task Force and the Attorney General's office are the following:

a) Witnesses viewing photo arrays and lineups should view the suspect and fillers sequentially rather than simultaneously, as this removes the relative judgment process. (Simultaneous presentation allows a victim to compare all the photos and make a relative judgment regarding which photo looks most like the person who attacked them. In simultaneous arrays, witnesses are more likely to identify someone as the perpetrator, whether or not the actual perpetrator is in the photo array. Sequential presentation requires a witness to compare the image in his mind to a single photo, and answer "yes" or "no" to the question "Is this the person who attacked you?")

b) Photo arrays and lineups should use a "double blind" procedure, where the administrator doesn't know who the suspect is and therefore is not in a position to unintentionally influence the witness's selection. (Often the lineup administrator unwittingly gives non-verbal cues---for example, leaning forward when a witness is viewing the suspect's photo.)

c) Witnesses viewing photo arrays and lineups should be instructed that the real perpetrator may or may not be present and that the investigation will continue even if the witness does not select any of the individuals in the photo array or lineup. (Victims are often concerned about getting a dangerous individual off the streets, and therefore may feel pressured to select someone from the array.)

d) Eyewitness confidence should be assessed immediately after an identification is made, as confidence is particularly susceptible to influence by information provided to the witness after the identification process. (I was not asked how certain I was that Mr. Avery was my attacker immediately after I selected his photo. Feedback I received that I had selected the suspect, information I learned about Mr. Avery's prior record and statements he allegedly made to the arresting officers all increased my confidence, over time, that he was the individual who assaulted me.)

These techniques were not standard operating procedures for most law enforcement jurisdictions in 1985, when I was assaulted. They are considered to be the best practices in eyewitness identification today.

It was exactly two years ago today, on September 7, 2003, that I learned that Mr. Avery was not my attacker. Ultimately, no one can give back to Steve, or any other exonerees, the years that they spent behind bars for crimes they did not commit. Their losses and those of their families are immeasurable. While no laws can make a system perfect, the proposed legislation will reduce the likelihood of future wrongful convictions, sparing others the Averys' ordeal.

It's also important to remember that every wrongful conviction is also a wrongful acquittal. Gregory Allen, my actual assailant, remained free for ten years after attacking me. In 1995 he was convicted of the brutal rape of a woman in Green Bay. We will never know how many other women he assaulted in that ten year period. Each day I say a prayer for this Green Bay woman and Mr. Allen's other victims and I speculate how different their lives would be had I not mistakenly identified Mr. Avery as my assailant.

I am not here today to assess blame or point fingers at anyone. I am acutely aware of the fact that I played a role in this miscarriage of justice and continue to be humbled by the gracious manner in which I've been treated by Mr. Avery and his family. Rather, I am here today to celebrate the fact that so many individuals and organizations in the State of Wisconsin took action so quickly to try to ensure that we learned from our mistakes. The Avery Task Force, the Attorney General's office, the UW Madison Law School and Innocence Project, Marquette Law School and the State Bar Association have all played important roles in developing these reforms.

In the name of Gregory Allen's other victims, in the name of all who are harmed when an innocent is imprisoned and the guilty remain free, and especially in the name of Steven Avery, Chris Ochoa and all others who have been convicted of crimes they did not commit, I ask you, the legislators in this state, to consider carefully the proposed legislation. The citizens of Wisconsin deserve no less.


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Criminal Law Section

State Bar of Wisconsin
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To: Senator David Zein, Chair
Representative Mark Gundrum Chair
Members of the Board of Governors

From: Jerome F. Buting, Chairman
Criminal Law Section Board
State Bar of Wisconsin

Date: September 7, 2005

Re: **Support for Senate Bill 315 and Assembly Bill 648**

The Criminal Law Section of the State Bar of Wisconsin supports passage of the recommendations of the Avery Task Force as Senate Bill 315 and Assembly Bill 648. The Criminal Law Section is a voluntary organization within the State Bar, representing over 600 criminal defense lawyers, prosecutors, judges and academicians with the purpose of promoting respect, fairness and professionalism in the administration of criminal justice in Wisconsin. As of this date, our request for passage of this legislation is only that of the Criminal Law Section Board. However, we have requested that the Board of Governors of the State Bar of Wisconsin adopt the recommendations of the Avery Task Force on behalf of the full membership of 22,000 attorneys and judges through out the state. The Board of Governors will consider our request at its next meeting on September 30, 2005.

The Criminal Law Section Board believes that this package of recommendations represents a very good bipartisan effort, crafted after extensive committee hearings, obtaining and considering the presentations of those with expertise in the areas of concern, and working with law enforcement representatives. The final package will make our justice system better ensure that the innocent are not convicted of crimes they did not commit. This is exactly how legislation affecting criminal justice should be enacted, i.e., after deliberate and careful consideration. In considering the Section's request for support from the Board of Governor's the Section noted that it believes that the Bar should hold this process up as an example of excellent deliberation and good legislation.

We commend Representative Gundrum and Senator Zein for their leadership on this Task Force and all members of the Task Force for their commitment to addressing the need for reform within the criminal justice system.

State Bar of Wisconsin
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Pedro Colón
STATE REPRESENTATIVE

Testimony in Support of Assembly Bill 648 and Senate Bill 315

Assembly Committee on Judiciary
&
Senate Committee on Judiciary, Corrections & Privacy

Wednesday, September 7, 2005
9:00 a.m.
411 South

By

Representative Pedro A. Colón

Good morning and thank you Chairman Gundrum, Chairman Zien and Committee members for allowing me the opportunity to testify today in support of Assembly Bill 648 (AB 648) and Senate Bill 315 (SB 315).

I would like to start off by thanking Chairman Gundrum for taking a leadership roll by creating the Avery Taskforce in December of 2003. It was an honor and privilege to serve on this Taskforce and I commend Chairman Gundrum for bringing together such a diverse and talented group. I believe that AB 648 and SB 315 represent a strong body of work that the Assembly Judiciary Committee and Senate Judiciary, Corrections and Privacy Committee should support.

As all of you are aware, this bill is the result of the tragic injustice that Mr. Steven Avery suffered by serving 18 years in prison for a sexual assault that he did not commit. Thanks to the work of the Wisconsin Innocence Project at the University of Wisconsin Law School, Mr. Avery was release from prison on September 11, 2003.

By December of that year Chairman Gundrum created the Avery Taskforce. This committee worked diligently for over a year in order to come up with some proposals that I believe will strengthen our judicial system and help to ensure that Mr. Avery's experience is not shared by anyone else. The proposals before you are the culmination of this work and I am proud to be a co-author.

The recommendations of Assembly Bill 648 and Senate Bill 315 include:

- **Eyewitness identification reform.** The legislation that will require law enforcement agencies in Wisconsin to adopt policies or guidelines on eyewitness identification procedures that are designed to minimize the risks of eyewitness error. Over the course

8th Assembly District

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of our work, the Avery Taskforce, studied and heard from national experts and reviewed policies and guidelines from other jurisdictions. We adopted a set of model guidelines designed to ensure that police obtain the most reliable eyewitness identifications possible. The guidelines address issues such as proper selection of lineup or photospread fillers, proper instructions to witnesses, double-blind testing, and sequential presentation of suspects or photographs.

- **DNA preservation legislation**. Under the provisions of AB 648 and SB 315 the law will clarify the kinds of biological evidence that law enforcement agencies must retain as long as anyone remains in custody in connection with the offense for which the evidence was collected. The bills also reduce the amount of material law enforcement agencies must retain, and is designed to clarify and ease the burden on law enforcement agencies, while ensuring that necessary biological material is preserved.
- **DNA testing legislation.** AB 648 and SB 315 also will; clarify which laboratories are responsible for postconviction DNA testing; clarify who pays for the testing; and require that testing that might prove innocence shall be given priority by the laboratories. The legislation will also provide additional funding to the laboratories to enable them to give the postconviction DNA testing priority.
- **Statute of Limitations legislation.** Under current law, when police develop a DNA profile of a sexual assault perpetrator but cannot find the person who matches that profile, the state may prosecute the perpetrator, without regard to the statute of limitations, whenever the state finds a person who matches the DNA profile of the perpetrator. AB 648 and SB 315 will allow the state also to prosecute the perpetrator for any other crimes committed at the same time and as part of the same course of conduct as the sexual assault, without regard to the statute of limitations, when the DNA profile of the perpetrator is matched to an individual.
- **Electronic Recording.** The provisions of AB 648 and SB 315 create policy for police to electronically record custodial interrogations of suspects. The policy is designed both to minimize the risks of false confessions, and to provide police, prosecutors, and courts, with the best possible evidence in cases where suspects do confess.

In closing, I strongly urge the committee to support the provisions of these bills. I believe they give us the tools necessary to strengthen our judicial system to ensure that the innocent go free and the guilty are held accountable for their actions.

Thank you again Chairman Gundrum for taking the lead on these important issues. I would also like to thank all the members of the Avery Taskforce for all their hard work and dedication to ensuring the integrity of our justice system. I would urge the committee's support of Assembly Bill 648 and Senate Bill 315.


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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

PEGGY A. LAUTENSCHLAGER
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STATE OF WISCONSIN LEGISLATURE
BEFORE THE
ASSEMBLY JUDICIARY COMMITTEE
SENATE JUDICIARY, CORRECTIONS AND PRIVACY COMMITTEE

WRITTEN TESTIMONY OF
WISCONSIN ATTORNEY GENERAL PEG LAUTENSCHLAGER
IN THE MATTER OF ASSEMBLY BILL 648 AND SENATE BILL 315

SEPTEMBER 7, 2005

Thank you for the opportunity to submit written testimony at today's joint public hearing on Assembly Bill 648 and Senate Bill 315, regarding recommendations proposed by the Avery Task Force. Those recommendations relate to the retention and testing of evidence that includes biological material, the statute of limitations for crimes related to a sexual assault, eyewitness identification procedures and recording of custodial interrogations. The following comments incorporate my view of these recommendations, as well as those of career prosecutors and appellate litigators at the Department of Justice.

Wisconsin's criminal justice system is one of the best in the world, but it is not without fail. Steven Avery's case is a haunting reminder of what can happen in an imperfect system. I appreciate the hard work of the many people who came together in an effort to improve our criminal justice system and to prevent any future mistakes like those in the Avery case. However, just as Wisconsin's criminal justice system has flaws, Assembly Bill 648 and Senate Bill 315 also have flaws. My testimony today will focus on my concerns with the bills.

The bills will have a significant impact on the DNA sections of the Madison and Milwaukee Crime Laboratories. Under s. 974.07, the bill provides that a court may order the crime labs to do post conviction testing. A court may also order the evidence sent to a facility other than the crime labs for testing. The bills further provide that the crime labs shall pay for the testing ordered by a court under this section and pay for the work performed by a facility other than the crime labs if the court does not order the movant to pay for the testing.

The average DNA case handled by the crime labs involves testing 2-3 samples, but a complex murder or sexual assault can easily produce 30 or more samples for testing. Each sample processed by the crime labs has a cost of approximately $300. When samples are sent to outside labs for analysis, the charge per sample is approximately $750. Just one complex case requiring the testing of only 14 samples would cost the crime labs over $10,000. The crime labs

have no budget to pay for such work.

Under s. 165.75 of the bills, post conviction DNA testing ordered by a court shall have priority over other work of the laboratories. This has the potential to severely delay our work on pending homicides, sexual assaults, and other serious felonies.

The current backlog at the crime labs is approximately 900 cases. Management of these cases is a daily challenge. The labs must make sure that testing is completed in time for scheduled court dates. There are also instances when law enforcement agencies desperately need DNA test results as part of on-going criminal investigations. The labs are mindful of these needs and try to manage their caseloads to meet these priorities. With the crime labs mandated to perform post-conviction testing first, they may not be able to test other DNA samples prior to trial. District Attorneys may have to move for adjournment in serious felony cases or local law enforcement agencies may have their investigations slowed because the labs can't get testing done in their cases. In some instances, these changing priorities will delay the exoneration of innocent suspects as well as prolong the search for perpetrators. Should the testing of DNA in a case involving an unidentified serial rapist be put on hold because the crime labs are with these post-conviction requests, law enforcement and the public will be outraged.

I believe the electronic recording of custodial interrogations will help to secure convictions of the guilty and avoid convictions of the innocent. These recordings will provide an accurate record of a defendant's questioning, will reduce the number of pretrial challenges to the voluntariness of Miranda waivers and resulting confessions, and will assist the jury in evaluating the credibility and trustworthiness of the defendant's statement.

However, as drafted, the bills would require circuit court judges to instruct jurors that they may consider the unexcused failure to record an interrogation in evaluating all of the evidence in the criminal case. A prosecutor may present testimony and other evidence from dozens of witnesses in a criminal case. Most of that testimony and evidence has nothing to do with the voluntariness of a defendant's Miranda waiver and his resulting confession.

A number of states have taken different approaches to protecting against improperly coerced and unreliable confessions. As an alternative to the new jury instruction proposed in s. 972.115(2)(a), I strongly encourage the legislature to review Maine's statute, which requires state law enforcement officials to establish and promulgate minimum standards for a law enforcement policy of recording custodial interrogations in serious criminal cases. The Wisconsin Department of Justice has already begun the process of establishing such standards. That would allow continued reliance on WIS-JI CRIMINAL 180, a copy of which is attached to this testimony. This jury instruction already allows jurors to consider the absence of a contemporaneous recoding when considering the probative value of a defendant's statement.

Should the legislature choose to proceed with the version of the bill as drafted, proposed s. 972.115(2)(a) and (2)(b) should be amended so that the jury would be instructed to "consider the absence of an audio or audio visual recording of the interrogation in evaluating the evidence relating to the interrogation of the defendant and the credibility and trustworthiness of any resulting statement in the case[.]" This amendment would also make it clear that subsections

(2)(a) and (2)(b) only apply when a defendant's own custodial statement is admitted against him at trial, and would not prevent the admission of unrecorded statements made by other witnesses and offered against the defendant. Lastly, additional direction should be given as to what type of argument to the jury is permissible if the circuit court judge decides that one or more of the stated exceptions to the recording policy applies.

Further, s. 938.31(3)(c)1 and s. 972.115(2)(a)1 provide the exception for admissibility of an unrecorded statement when the suspect refuses to cooperate with recording. These sections require that the refusal either be recorded or that a "contemporaneous written record" of the refusal be made. The bills should be amended to specifically provide that the contemporaneous written record be made "by the law enforcement officer". The current language is potentially problematic if it is read to require that the uncooperative suspect sign a form refusing the recording when the refusal is not itself recorded. S/He will be unlikely to sign it. Admittedly, this potential problem would rarely arise even under the current language. However, this is an example of the advantage of crystal clarity.

Regarding time limits for prosecuting certain crimes, s. 939.74(2d)(am) defines "related crimes" for purposes of the expansion of the statute of limitations for crimes associated with a sexual assault. I believe it would be wise to have this definition match or incorporate the language of current s. 971.12(1). Section 971.12(1) defines which crimes can be "joined" in the same criminal complaint. The advantage of defining "related crimes" in 939.74(2d)(am) consistently with s. 971.12(1) is that there is already a large body of decisional law defining the parameters of the "joinder" language. Therefore, the analysis of which crimes are "related" under s. 939.74(2d)(am) should be more clear for practitioners and courts, resulting in less dramatic and less voluminous appellate litigation.

Finally, the bill requires law enforcement agencies to adopt written policies governing the use of an eyewitness to identify a person suspected of committing a crime. Already the Bureau of Training and Standards of the Department of Justice has published, and done extensive training for law enforcement, on a new eyewitness identification protocol. This new protocol has been embraced by law enforcement throughout the state and is preferable to the adoption of varied individual department policies.

Again, thank you for the opportunity to submit testimony today on Assembly Bill 648 and Senate bill 315.

While the determination of "voluntariness" is for the court and the evaluation of "trustworthiness" is for the jury, it is obvious that many of the same facts are relevant to both determinations. However, the legal issues are different. The court will have determined that the statement is admissible by the time the jury hears it and the jury is not reviewing or duplicating that legal finding. Rather, the jury is to determine the weight and credibility of the statement. While case law has referred to this as "trustworthiness," the Committee concluded that there was little value in retaining the use of that term in the instruction and it was eliminated in the 1999 revision in favor of referring simply to "weight."

A variety of special circumstances may affect the weight, or trustworthiness, of a statement. In cases where a statement is of great importance, the court may find it appropriate to add to the standard instruction to recognize the special circumstances. However, the substance of the addition would be to advise the jury to consider the special circumstances in terms of the weight the statement is to be accorded. Instructions formerly published, which highlighted certain special circumstances, have been withdrawn (Wis JI-Criminal 182, 185, and 187, all copyright 1962).

The Wisconsin Supreme Court has discussed a variety of special circumstances in terms of their effect on the trustworthiness of confessions:

1. whether the statement was preceded or followed by other statements. Lang v. State, 178 Wis. 114, 189 N.W. 558 (1922); State v. Schlise, 86 Wis.2d 26, 271 N.W.2d 619 (1979).

2. whether the defendant suffered from mental incapacity. State v. Bronston, 7 Wis.2d 627, 97 N.W.2d 504 (1959).

3. whether the defendant was so intoxicated that his statement was not credible. State v. Verhasselt, 83 Wis.2d 647, 266 N.W.2d 342 (1978).

4. whether the statement was signed by the defendant (not relevant). Kutchera v. State, 69 Wis.2d 834, 230 N.W.2d 750 (1975).

5. whether the statement need be corroborated by other evidence in the case. Larson v. State, 86 Wis.2d 187, 271 N.W.2d 647 (1978); Schultz v. State, 82 Wis.2d 737, 264 N.W.2d 245 (1978); Triplett v. State, 65 Wis.2d 365, 222 N.W.2d 689 (1974); Holt v. State, 17 Wis.2d 468, 117 N.W.2d 626 (1962).

180 CONFESSIONS — ADMISSIONS

The State has introduced evidence of (a statement) (statements) which it claims (was) (were) made by the defendant. It is for you to determine how much weight, if any, to give to (the) (each) statement.

In evaluating (the) (each) statement, you must determine three things:

- whether the statement was actually made by the defendant. Only so much of a statement as was actually made by a person may be considered as evidence.
- whether the statement was accurately restated here at trial.
- whether the statement or any part of it ought to be believed.

You should consider the facts and circumstances surrounding the making of (the) (each) statement, along with all the other evidence in determining how much weight, if any, the statement deserves.

COMMENT

Wis JI-Criminal 180 was originally published in 1962 and revised in 1967 and 1991. This revision was approved by the Committee in August 1999.

This instruction is to be used when evidence has been admitted relating to a statement made by the defendant. For the statement to have been admissible, the court will have determined that it was obtained in compliance with Miranda and that it was voluntarily made. The statement must still be evaluated by the jury in terms of its "trustworthiness," that is, its weight and credibility. Jackson v. Denno, 378 U.S. 368 (1964); Lego v. Twomey, 404 U.S. 477 (1972); State ex rel. Goodchild v. Burke, 27 Wis.2d 244, 258-65, 133 N.W.2d 753 (1965); State v. Verhasselt, 83 Wis.2d 647, 659, 266 N.W.2d 342 (1978). The jury should also consider whether the statement was accurately related at trial by the witness. State v. Miller, 35 Wis.2d 454, 465, 151 N.W.2d 157 (1967).


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Spencer Coggs

State Senator

Mr. Chairman and Members,

Thank you for allowing me to come before you today to testify in support of Senate Bill (SB) 315/Assembly Bill (AB) 648. As you know, I have joined Chariman Zien and Representative Gundrum in introducing this legislation. I would like to commend Representative Gundrum for his leadership of the Avery Task Force and in crafting this important bill.

As we are all aware by now, the problems and issues addressed by SB 315 came to light after the Wisconsin Innocence Project proved that Mr. Steven Avery had been mistakenly imprisoned for 18 years. After reviewing his case, it became obvious that our justice system needed to be changed to help avoid an issue like this in the future. We may not be able to make the system foolproof, but these are some common sense reforms that we can all agree are in the best interests of those are accused of committing a crime in the State of Wisconsin.

This legislation was crafted after careful consideration by a Task Force of experts and members of both parties from the State Legislature. The Task Force carefully considered input from a wide variety of criminal justice system experts from around the country and helped to mold those suggestions to fit the specific instances brought to light by the Avery case.

As you have heard details about this bill from Chairman Zien and Representative Gundrum, I will not go into detail on the specifics of the legislation. But I would urge you to support this bill in your committees and forward it to the floor soon. The faster these protections are in place, the faster we are able to help protect other defendants from falling into the same legal quandary as Steven Avery.

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WDAA SUPPORTS AVERY PROPOSALS; SUGGESTS MODIFICATIONS

Good Morning! My name is Scott Horne and I am the District Attorney for LaCrosse County and a member of the Avery Task Force. I am also President of the Wisconsin District Attorney's Association and it is in that capacity that I speak this morning.

We achieve justice when those who commit crime are held accountable, those who are innocent are set free and the public is protected from those who would prey upon its members. The Wisconsin District Attorneys Association largely supports the proposals of the Avery Commission. We propose several amendments that we believe are consistent with the spirit of the legislation and improve the product.

With respect to the proposal on eyewitness identification, we believe law enforcement, prosecution and the courts have an obligation to use the most reliable means of identification possible. We also believe that law enforcement and the prosecution bear primary responsibility for investigative procedures that are most productive of the truth. The Avery legislation strikes the proper balance between respect for the role of the discretion of law enforcement professionals and the interest in promoting best practices that promote the highest degree of reliability in identification procedures. It requires law enforcement, as in high-speed pursuit, to develop protocols and procedure but respects the professionalism and independence of law enforcement by not requiring specific protocols and procedure. It does serve to promote best practices however by ensuring law enforcement is made aware of and trained in state-of-the art identification techniques. We believe the vast majority of law enforcement agencies will adapt and utilize these techniques in their departments because it is the right thing to do.

With respect to DNA testing, we generally support this legislation and believes it improves recent legislation expanding the authority of prosecutors to charge offenses based on a DNA profile match lending clarity to the requirement for preservation of DNA evidence for testing. We agree that it is not acceptable that a defendant waits almost two years for testing. We are concerned however at the language requiring that the crime laboratory gives priority to old cases, implicitly jeopardizing speedy trial rights of defendants and victims. We are concerned at the prospect that the Crime Laboratory

would give priority to old cases in the face of speedy trial rights on the part of defendant's and victims. A violation of speedy trial rights could easily allow a dangerous offender to be released or a victim to suffer the ordeal of extended trauma if a trial is delayed due to a statutory obligation to give priority to old cases at the expense of speedy trial rights on the part of defendants and victims. Amending the proposal to reflect that this new priority be "consistent with the right of a defendant or victim to a speedy trial" would alleviate this concern..

Finally, we note that the legislation contemplates additional hiring at the crime laboratory for DNA testing. Sufficient crime lab resources are imperative if the goal of prioritized testing of old cases is to be met without jeopardizing the interest of the public and participants in prompt resolution of violent sexual assaults and similar crimes.

Finally, with respect to recorded interviews of defendants, we agree in principle with the proposals by the Avery Commission. Again however we would suggest modifications which we believe would improve the product.

First, we support the creation of a fund which would support grants for equipment required in light of this legislation. However, equipment is needed not only for making recordings of interviews but also for "playing and copying of recorded interviews." We would propose that similar language be included as describing the type of equipment eligible for reimbursement through the grant process and that "a prosecutorial unit described in sec. 978.001(2) and 978.01(1) be eligible for grant-funded reimbursement of expenses.

Secondly, we have a concern that equipment purchased by law enforcement may prove incompatible with that used by prosecutors to view and make copies and by the courts to play recordings for juries. We would propose an amendment requiring that the Division of Training and Standards or similar entity be charged with establishing standard equipment and file formats for recording, copying and viewing of recordings. We would also suggest that only grants meeting these requirements be eligible for reimbursement.

Finally, a significant issue in the Task Force discussions related to costs beyond the recording, copying and playing of videotapes. It was made clear that costs of transcription could greatly increase the costs to counties if transcription of tapes were required. It was also made clear that transcripts

would not be required by this legislation. Some members of our association have expressed a concern that, absent a legislative declaration, some courts would require the state to provide a transcript of the recorded interview in violation of the spirit of the Avery Committee discsussion. The costs of this legislation would increase dramatically if courts were allowed to issue such orders. Accordingly, we would propose language making clear that a statement would be admissible in court if the recording requirements are met and that evidence could not otherwise be excluded.

We appreciate the opportunity to address these committees of the Assembly and Senate and trust these comments will be viewed as constructive suggestions designed to improve the product of the Avery Commission.

Any Questions?

SCOTT l. HORNE,
PRESIDENT, WDAA
LA CROSSE COUNTY DISTRICT ATTORNEY


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NAME **Jean D. Peduzzi**	POSITION TITLE **Associate Professor**

EDUCATION

INSTITUTION AND LOCATION	DEGREE *(if applicable)*	YEAR(s)	FIELD OF STUDY
University of Michigan, Ann Arbor, MI	B.S.	1975	Zoology
Wayne State University, Detroit, MI	Ph.D.	1981	Cell Biology & Anatomy

A. Positions and Honors.

Positions and Employment

1976 - 1981	Graduate Research Assistant, Department of Anatomy, School of Medicine, Wayne State University, Advisor: Dr. William J. Crossland
1981 - 1991	Research Associate, Department of Physiological Optics, School of Optometry, University of Alabama at Birmingham, Advisor: Dr. Terry L. Hickey
1989 - 1992	Co-Director of Histological Analysis Module, Vision Science Research Center, University of Alabama at Birmingham
1989 - 2005	Associate Scientist, Vision Science Research Center, University of Alabama at Birmingham
1991 - 1997	Research Assistant Professor, Department of Physiological Optics, School of Optometry, University of Alabama at Birmingham
1997 - 2005	Associate Scientist, Injury Control Research Center, University of Alabama at Birmingham
1999 – 2005	Associate Scientist, Center for Injury Sciences, University of Alabama at Birmingham
1997 - 2005	Research Associate Professor, Department of Physiological Optics, School of Optometry, University of Alabama at Birmingham
2005 – Present	Associate Professor, Department of Anatomy and Cell Biology, School of Medicine, Wayne State University

Professional Memberships and Honors

NIMH Special Review Committee, RFA on Developmental Studies of the Cerebral Cortex, 1994

Search Committee, Director of Developmental Psychology Doctoral Program, Psychology Department, University of Alabama at Birmingham
Member, Scientific Advisory Board, Organogel Canada, 1998
Treasurer, Women In Neurotrauma, 1999-2001
Hammer Fund Award, Neuroscience meeting in Los Angeles, CA, 1981
Pressbook Selection, 1997 Abstract for Society for Neuroscience
Guest, President Bush's Speech on Cloning, White House, 2002
Witness, US Senate Science, Technology, & Space Hearing Committee, 2003

B. Selected peer-reviewed publications

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